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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 2001

THEODORE M. SMITH,

Petitioner,

v.

DAVID PLATI, individually and in his official capacity as Assistant Athletic Director for Media Relations of the University of Colorado; **THE UNIVERSITY OF COLORADO;** and **THE REGENTS OF THE UNIVERSITY OF COLORADO**

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Supreme Court permit the varying, discordant requirements of the Circuit Courts of Appeal that in some fashion no person may maintain an action for infringement of his or her First Amendment right to freedom of speech unless that person's speech is first "chilled" into silence?

2. Where the medium of speech being infringed is the internet, is a required showing of "chilling" a person into total silence even a realistic prerequisite given the ease of expression on the internet?

3. Are the many and varied forms of retaliation taken by a state government agency against Petitioner Smith for his exercise of speech on the internet, including arrest, physically excluding him from the entire campus of the University of Colorado at Boulder, retaliation against his volunteers, and denying him access to public information, sufficient to permit Smith to maintain an action for denial of his Freedom of Speech?

As will be seen, existing law in the circuits ranges from a subjective test for chilling -- whether the particular victim was chilled into silence -- to an objective test for chilling. Existing law ranges from whether the trial-level finder of fact did properly find chilling -- a test for evidence necessary to support such a finding -- to the Tenth Circuit's finding of "some" evidence which could support a finding of chilling or lack of chilling in a search made for the first time at the appellate level in the instant case

Parties to the proceeding

The caption to the proceeding contains the complete and correct name of all parties to the proceeding in the court below.

There are no nongovernmental corporations which are parties to this proceeding.

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Official reports of the opinions of the courts below

The decision of the United States Court of Appeals for the Tenth Circuit is ***Smith v. Platt***, 258 F.3d 1167 (10th Cir. 2001), attached in the appendix to this petition, as is an order denying a petition for rehearing. The district court's opinion is ***Smith v. Platt***, 56 F. Supp. 2d 1195 (D. Colo. 1999). A copy of that decision is also appended to this petition.

Jurisdiction of the Supreme Court

Review by writ of certiorari is sought of the decision of the United States Court of Appeals for the Tenth Circuit entered on July 30, 2001. That court denied a petition for rehearing on November 12, 2001.

Justice Breyer ordered that the time for filing of this petition for writ of certiorari be extended to and including April 11, 2002.

This Supreme Court has jurisdiction of the appeal from the final decision of the court of appeals pursuant to 28 U.S.C. § 1254(1).

Under Rule 10 of this Supreme Court, this Court has jurisdiction because the decision of the

court of appeals conflicts with that of other courts of appeals on an important matter of justiciability of First Amendment claims. Furthermore, that question concerns a doctrine of law established by some of the courts of appeals that has not, but should be, settled by this Court.

Constitutional provisions and statutes involved in the case

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial

officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the case

Review is sought of a decision of the United States Court of Appeals for the Tenth Circuit. An appeal was taken to that court from the United States District Court for the District of Colorado, to which had been removed an action originally filed in the District Court in and for the County of Boulder and State of Colorado. The state action contained a claim under the First Amendment to the Constitution of the United States, so that it stated a claim pursuant to 42 U.S.C. § 1983. The federal district court had removal jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441(a).

Petitioner Theodore M. Smith ("Smith") is an individual. He was plaintiff in the action and appellant in the Tenth Circuit.

This case arises from Smith's attempt to operate an internet site, and the actions taken against Smith and that internet site by Respondent The University of Colorado and an individual who controls that University's athletic media relations, Respondent David Plati ("Plati").

Smith's website is http://netbuffs.com,[1] or, more simply, netbuffs.com. It has been in continuous public operation since September 2, 1997. It carries information on sports and from time to time information promoting the University of Colorado in general. Its most active feature is a

[1] The symbol, or mascot, of the University of Colorado at Boulder is an actual live buffalo, or more technically accurately a bison. The name "netbuffs" thus is formed from "net," a contraction of internet, and "buffs," a contraction of buffaloes.

message board where thousands participate, including participants from some twenty-seven thousand unique computers of origin as recently as last November. It includes discussions of sports, the government management of sports, and even such issues as the right of women to participate in sports under Title IX, 20 U.S.C. § 1681(a). Smith's netbuffs.com internet site has always been operated totally at his own expense, with a view to benefiting the University of Colorado.

For reasons still never explained, Plati used his power as an official at the University of Colorado to attack Smith and the netbuffs.com website. After a year of generally friendly relations with Plati after netbuffs.com opened, things began to go wrong in the fall of 1998.

Plati simply went after Smith and his netbuffs.com internet site in every way he could.

Plati had Smith removed from watching on University athletic fields simply because Smith had an internet site. Plati had another individual removed from University athletic fields simply because that individual had written on Smith's site ***in the past***. Plati terminated a relationship under which Plati had permitted Smith to earn sideline passes at football games. Plati then had Smith arrested in a public area in Plati's office simply by stating falsely to police officers that the area Smith had been going for years was private, so that Smith was trespassing. Far worse for Smith's efforts to produce news about the University of Colorado and its sports or other

matters, Plati succeeded in having University police officers bar Smith from the entire campus of the University of Colorado at Boulder for an entire calendar year.

These incidents will be discussed in more detail ***infra*** in relationship to the law.

Nevertheless, the trial court and the Tenth Circuit ruled against Smith in every respect.

The trial court generally ruled that there was no way Smith could overcome a showing of qualified immunity by demonstrating a case in which the Tenth Circuit had ruled unconstitutional a retaliatory false arrest by a government official who was not a police officer.

The Tenth Circuit did not affirm on these grounds.

Instead, the circuit ruled against Smith on another ground, the relatively new doctrine that to sustain First Amendment recovery "the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity . . . ." ***Smith v. Plati***, 258 F.3d 1167, 1176 (10th Cir. 2001).

That part of the decision of the Tenth Circuit and the way it was applied to the facts of this case are the heart of this petition for certiorari.

ARGUMENT

I. The "chilling" tripwire in general

The legal test adopted by the Tenth Circuit, then, is whether the misconduct of a defendant is enough to chill or silence a person of ordinary firmness. That test is an objective one, looking to a person of "ordinary firmness." The Tenth Circuit's statement was that:

> "Because it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity, we conclude that the proper inquiry asks 'whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.'"

Smith v. Plati, 258 F.2d at 1177, quoting ***Mendocino Environmental Center v. Mendocino County***, 192 F.3d 1283, 1300 (9th Cir. 1999), quoting from ***Crawford-El v. Britton***, 93 F.3d 813, 826 (D.C. Cir. 1996), *vacated on other grounds* 523 U.S. 574, 118 S. Ct. 1584, 140 L.Ed. 2d 759 (1998).[2]

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[2] The Tenth Circuit choose simply to ignore another claim made by Smith, that the ongoing prosecution of Smith constituted the constitutional tort of malicious prosecution under 42 U.S.C. § 1983. Though there is some difference in opinion among different courts, in the Tenth Circuit "Our court has recognized the viability of malicious prosection claims under § 1983, as well as claims for wrongful arrest." ***Taylor v. Meacham***, 82 F.3d 1556, 1560 (10th Cir. 1996), *cert. denied* 519 U.S. 871 (1996).

II. The split in the circuits

There is a split among the circuits as to this "objective test" requiring anti-First Amendment conduct which would prevent or chill a person from First Amendment activities.

(It is important to note in reviewing the cases dealing with chilling that the circuits are misstating the actual meaning of "chilling," which does ***not*** mean to terminate or to end.[3])

This Supreme Court appears not to have ruled on the specific question of a threshold requirement for a suit alleging a violation of free speech outside the realm of public employer action against a public employee. Some lower court cases refer to the older decision of ***Laird v. Tatum***, 408 S.Ct. 1, 13-14, 92 S.Ct. 2318, 2325-2326, 33 L. Ed. 2d 154, 163 (1972). However, that case dealt only with a question of surveillance activities by the United States Army.[4]

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[3] To chill is "to affect as if with cold : **DAMPEN, DEPRESS, DISCOURAGE, DISPIRIT.**" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, p. 388 (3d Ed. 1993). The Tenth Circuit and other courts use "chill" as synonymous with "termination" of speech. That is not the meaning of the word. Invariably to require absolute termination of speech is to misunderstand what "chill" means, and to impose a requirement of wholly successful silencing that doesn't seem to have been satisfied in any of the cases.

[4] This Court ***has*** dealt with the issue of freedom of speech of an independent contractor to a public entity alleged to be violated by that public entity. See ***Board of County Comm'rs of Wabaunsee County v. Umbehr***, 518 U.S. 668, 116 S.Ct. 2342 135 L. Ed. 2d 843 (1996). Interestingly, unlike the new test some of the circuits have created for situations outside public employment, this Court had no difficulty in extending the ***Pickering*** rule to the independent contractor

Rejecting a chilling test.

In ***Suarez Corp. v. McGraw***, 202 F.3d 676 (4th Cir. 2000), the Fourth Circuit examined some of the cases espousing the "chilling" requirement, but concluded that many of them arose from official revelations of private information about plaintiff individuals. Absent such as situation, it came up with a test of its own

> "[W]e find that the appropriate inquiry to determine whether McGraw and Rodd adversely affected SCI's First Amendment speech rights to be whether their speech was threatening, coercive, or intimidating so as to intimate that punishment, sanction, or adverse regulatory action will imminently follow."

202 F.3d at 689. Thus the test departed from any showing of objective or subjective chilling and instead became one of whether adverse action would follow.

The Fifth Circuit has at least once rejected the "chilling test" in its entirety. That court said at least in ***Colson v. Grohman***, 174 F.2d 498, 512 (5th Cir. 1999) that "harms that, while they may chill speech, are not actionable under our First Amendment retaliation jurisprudence."

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situation. However, that case does not in its terms control this situation where no public employment or contracting relationship exists.

Not mentioning chilling.

The Sixth Circuit has even found a sufficient allegation of a First Amendment violation in administering ***a car-towing list*** to prevent dismissal of a First Amendment claim, without even mentioning whether or not there was a "chilling" effect. ***Lucas v. Monroe County***, 203 F.3d 964, 973 (6th Cir. 1999), following ***Blackburn v. City of Marshall***, 42 F.3d 925, 929 (5th Cir. 1995).

The Eight Circuit resolved a recent First Amendment dispute without even referring to a chilling test, and it is unlikely any chilling test would have been met. In ***Cuffley v. Mickes***, 208 F.3d 702 (8th Cir. 2000), cert. denied sub nom. ***Yarnell v. Cuffley***, 121 S.Ct. 1225, 149 L.Ed.2d 135 (2001) the circuit court upheld a First Amendment suit of the Ku Klux Klan to be allowed to participate in an Adopt-A-Highway program with attendant publicity for the Klan's participation.

Subjective, not objective, test for chilling.

The Second Circuit at least once has rejected the objective standard for testing for chilling, instead applying a subjective test as to whether anyone in fact got chilled out of a First Amendment exercise. One case is ***Connell v. Signoracci***, 153 F.3d 74, 79 (2d Cir. 1998), finding that "the defendants' actions hurt her business [of topless dancing (!)], chilling their exercise of First Amendment rights."

The Eleventh Circuit appears to have required an actual, subjective chilling of First Amendment rights in ***Pittman v. Cole***, 267 F.3d 1269 (11th Cir. 2001). In fact, the fear required was actual and subjective, but the fear of future consequences "for engaging in expressive activity" was not enough unless the fear was "objectively reasonable." 267 F.3d at 1284, quoting from ***Wilson v. State Bar***, 132 F.3d 1422, 1428 (11th Cir. 1998).

Low level of chilling.

The Ninth Circuit has held that a "retaliation claim may assert an injury no more tangible than a chilling effect of First Amendment rights." ***Gomez v. Vernon,*** 255 F.3d 1118, 1127 (9th Cir. 2001), cert. denied sub nom. ***Beaudair v. Gomez***, 122 S.Ct. 667, 151 L.Ed. 2d 581 (2001), which the Tenth Circuit cited in ***Poole v. County of Otero,*** 271 F.2d 955, 960 (10th Cir. 2001).

Cases adopting a chilling test.

However, the truth is that a number of cases have, as the court below suggested, stated they are following or adopting the "chilling" element as a prerequisite to a First Amendment freedom of speech claim under 42 U.S.C. § 1983, and, on occasion, making it a subjective test.

In ***White v. Lee***, 227 F.2d 1214 (9th Cir. 2000), a "chill" shown when HUD carried on an eight month investigation of those opposing a

federally-sponsored housing project, with interrogation of plaintiffs with threat of subpoena and derogatory comments about plaintiffs opposing housing for the disabled.

Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998) held that "chilling" shown when sheriff held a press conference disclosing details of rape of plaintiff). Indeed, the conduct of the defendant in ***Bloch*** was striking, involving retaliation by a criticized sheriff by holding a press conference to publicly disclose the details of how Plaintiff Bloch was raped. However, ***Bloch*** made it clear that far lesser conduct would suffice, relying heavily on ***Barrett v. Harrington***, 130 F.3d 246 (6th Cir. 1997). That case had held that it was enough of an adverse action by a defendant judge to criticize the plaintiff in a letter to a district attorney and in a press conference for allegedly harassing the judge. Plaintiff's allegation that the defendant judge acted with a "retaliatory motive to publicly humiliate and denigrate" was enough to state a § 1983 claim. 130 F.3d at 263.

Crawford-El v. Britton, 93 F.3d 813, 826 (D.C. Cir. 1996), *vacated on other grounds 523 U.S.* 544, 118 S.Ct. 1584, 140 L.Ed. 2d 759 (1998) noted that "As to sort of injury cognizable under the First Amendment, Crawford-El alleges the costs of replacing underwear, tennie shoes, soft shoes and other items . . . ." Granted, that was an inmate. But if one has to look to circumstances to determine whether a chilling exists, then Smith is entitled to show ***all*** the subjective facts of how Plati's conduct affected him.

In fact, some confusion has been added to the situation by the tendency of some of the circuits to move the "chilling" test back into the area of public employee rights, historically covered by the different tests of ***Pickering v. Board of Education***, 391 U.S. 563, 88 Sup. Ct. 1731, 20 L. Ed. 2d 811 (1968). Supposedly the "chilling" test was adopted for First Amendment matters ***not*** involving public employment because ***Pickering*** was suitable ***only*** for public employment speech cases, but some cases move the "chilling" test right back into the public employment area.. See, e.g., ***Charvat v. Eastern Ohio Regional Wastewater Authority***, 246 F.3d 607, 616 (6th Cir. 2001), applying the criterion of likely chill of a person of ordinary firmness to the public employment situation.

To show the misuse of the word "chill," ***it appears that in not one single one of all these circuit decisions and the Tenth Circuit ones discussed next did the government conduct either "chill" anyone into silence or even deter filing of suit,*** with the sole exception of a Tenth Circuit decision not officially reported which is discussed in the next section.

III. The Tenth Circuit rule

Where does the Tenth Circuit fit into this? The Tenth Circuit in fact has adopted a "chilling" test. The first officially-reported decision is ***Worrell v. Henry***, 219 F.3d 1197 (10th Cir.

2000), cert. denied ***Turner v. Worrell***, 121 S.Ct. 2521, 150 L.Ed.2d 693 (2001). That decision was issued on July 26, 2000, substantially after April 6, 2000, when Smith's final brief was filed. The ***Worrell*** decision was on review of summary judgment and does not require pleading of any chilling effect. The injury was that there was evidence that a defendant's comments might have stopped a government agency from hiring the plaintiff. The Tenth Circuit held that "a factfinder could conclude that Mr. Turner caused Mr. Worrell 'an injury that would chill a person of ordinary firmness from continuing to engage in that activity.'"[5] Thus ***Worrell*** did not deal with any requirement of pleading, was a summary judgment case, and left any determination of chilling to a finder of fact.

A much more recent Tenth Circuit decision also appears to be in conflict with its decision in ***Smith v. Platt***. In ***Poole v. County of Otero***, 271 F.3d 955 (10th Cir. 2001) the individual plaintiff alleged that criminal charges for a wild motorcycle race through a New Mexico town were brought to discourage him from exercising his constitutional, First Amendment right to commence a civil lawsuit against the town's police for the transaction. The Tenth Circuit held that

> "Taking the factual allegations in Mr. Poole's complaint as true, we conclude that facing criminal charges that were brought in order to hinder

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[5] 219 F.3d at 1213, quoting from an earlier Tenth Circuit decision which was not officially published, ***Lackey v. County of Bernallilo***, 1999 WL 2461, at *3 (10th Cir. 1999).

> or prevent him from filing a civil lawsuit against defendants is injury sufficient to chill a person of ordinary firmness."

271 F.3d at 960. That the plaintiff Poole had gone ahead to file the lawsuit did not detract from the objective chill in the Tenth Circuit's view. It is hard to see how Smith's unwillingness to be silenced in this case by the criminal charge against him (and many other actions) can be reason to bar him from constitutional redress.

In ***Collopy v. City of Hobbs***, 2001 U.S. App. LEXIS 27207 (10th Cir. 2001), a special master made recommendations to a children's court. The plaintiff special master made comments critical of the city police, so the chief of police in turn made a comment accusing the special master and his children of criminal conduct. The Tenth Circuit concluded that

> "A trier of fact may well find that supporting an official challenge to the impartiality of a part-time, resumably untenured, decisionmaker by portraying his children in this manner is not one of the many hazards that a judicial officer should be expected to face. We conclude that Collopy could persuade a reasonable trier of fact that the alleged attack on a reasonable person in his position and his children, such as that which Knott allegedly facilitated, would "chill" that person to the point

of resignation."

2001 U.S. App. LEXIS 27207, *12

Based on this the circuit remanded for trial.

Compare this to the decision the Tenth Circuit made in the instant case.

IV. The *Smith v. Plati* decision

In ***Smith v. Plati*** there was no discussion whatsoever of what Smith might be able to prove to a trial level finder of fact. Rather, as will be seen, the Tenth Circuit found only that "Smith's persistence in maintaining his website ***offers some evidence*** that Plati's actions did not prevent such private speech." 258 F.3d at 1177. (Emphasis added.).

That standard is strikingly, horrendously different from what is said in all the "chill" cases, that a reasonable finder of fact could find that that a person of ordinary firmness would be chilled or silenced. Here, there is just "some evidence." Here, there is no discussion at all of whether a person of "ordinary firmness" might be silenced, nor whether Smith persevered because he was "an unusually determined plaintiff persist[ing] in his protected activity."[6]

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[6] ***Smith v. Plati***, 258 F.3d 1167, 1177 (10th Cir. 2001), quoting from ***Mendocino Environmental Center v. Mendocino County***, 192 F.3d 1283, 1300 (9th Cir. 1999), which decision in turn was quoting from ***Crawford-El v. Britton***, 93 F.3d 813, 826 (D.D.C. 1996), *vacated on other grounds* 520 U.S. 1273, 117 S.Ct. 2451, 138 L.Ed.2d 210 (1997).

So all the Tenth Circuit could say was ***not*** about what a finder of fact might conclude, but only that there was "some evidence" supporting its position.

Given that internet speech is virtually free from some providers, and virtually anonymous, completely silencing an internet speaker is nearly impossible in any event.

The Tenth Circuit's opinion is shot through with comments that Smith's pleading could not be construed liberally as often done with a pro se pleader because Smith was an attorney. That led the circuit simply to ignore an entire deposition of Plati, an extensive affidavit and other material. In doing that, the circuit chose to ignore a very strong statement of its own in how to decide such cases. "When the First Amendment is implicated, we are obliged to 'make an independent examination of the whole record' in order to ensure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' ***Melton v. City of Oklahoma City***, 879 F.2d 706, 713 (10th Cir. 1989) (quoting ***Bose Corp. v. Consumers Union of United States***, 466 U.S. 485, 499, 104 S. Ct. 1949, 1958, 80 L. Ed. 2d 502 (1984)." ***Andersen v. McCotter***, 723 F.3d 723, 725 (10th Cir. 1996). By ignoring its own standard the Tenth Circuit changed the outcome of this case.

Furthermore, the circuit decided to rule on an issue not considered by the federal district court, a doctrine of "chilling" which the circuit had not officially adopted until shortly before the

submission of the ***Smith v. Plati*** appeal. While Smith does not disagree with a circuit court of appeals right to decide a case on a different ground, it at least should consider matters in the record on appeal which would change the outcome.

Furthermore, that conclusion was limited to only one aspect of Plati's actions against Smith's speech, the false arrest. Probably that was no more than the second most harmful action Plati took. For, much more important, Plati invoked a "bar" statute which prevented Smith from entering anywhere on the University grounds for a period of one entire calendar year. The Tenth Circuit said that "Plati's actions may have made it more difficult to obtain some information regarding the University's varsity athletic programs, but alternative avenues to information did remain available." 258 F.3d at 1177. The Tenth Circuit does not make it clear whether this refers to the year-long bar order. If it does, what "alternative avenues to information" did remain open to Smith? Reading newspapers instead of gathering news himself? Trying to reach University personnel on the telephone? Smith honestly has no idea what the circuit meant by this statement.

However, just consider the effect of this. Smith was trying to introduce persons to his website, often by passing out promotional materials, gathering information and talking to coaches and players. Exactly what alternative avenues were open? This simply was a hard, crushing blow.

Furthermore, Plati removed another individual from all practices, even though Smith, worried about this after Smith himself had been ordered out of practices by Plati, had the individual stop writing on his own name under netbuffs.com. If chilling a person into suppression of speech is the standard, this person has never since that incident posted on Smith's internet site.

The Tenth Circuit acknowledges that Plati threatened to copyright varsity sports schedules, but suggests that Plati might have had a right to do so. It needs no citation that there is no right to copyright the date and time of scheduled college sporting events. That Plati even tried to suppress information which could help attendance shows how desperate his acts were.

Plati even accused Smith of another crime in a newspaper, preposterously stating that for taking a photostatic copy of varsity schedules Smith should have been arrested for theft.[7]

Plati verbally abused a varsity football player because the player's father criticized Plati on Smith's internet site.

Plati even approached the criminal attorney Smith had retained to defend Smith on the criminal charge instituted by Plati, and attempted to persuade him not to represent Smith. The

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[7] A copy of this simple photocopied schedule appears as an attachment to Plati's deposition in the record on appeal.

Tenth Circuit's opinion callously ridicules this effort by Plati because it didn't succeed.

Ordinarily, this Supreme Court would not have reason to consider anything beyond the time of dismissal of the case by the trial court. However, Petitioner Smith believes it important to show the ongoing effect of the Tenth Circuit's decision releasing Plati from responsibility for any of his conduct, an effect which could be added to this case upon a reversal of the circuit.

Plati had denied Smith press credentials under various pretexts. However, in recent days Smith was given a newer Plati policy statement extending the possibility of press credentials to internet sites. However, a prerequisite would be that Smith disclose to Plati the names of such users of the netbuffs.com site and "accurate contact information." Plati thus could retaliate against speakers on netbuffs.com for anything he didn't like, which Plati has done to netbuffs.com users in the past when he has been able to identify them.[8] See the appendix to this petition at p. xxiii.

The approach of the Tenth Circuit overlooks a very important point. The Circuit chose to treat each of the incidents, the pretextual arrest, the exclusion from campus for a year, attacks on

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[8] This Supreme Court has strongly condemned requiring organizations to disclose membership, because that could diminish membership through the use of reprisals "and other manifestations of public hostility." ***NAACP v. State of Alabama ex rel. Patterson***, 357 U.S. 449, 462, 78 S.Ct. 1163, 1172, 2 L.Ed. 2d 1488, 1500 (1958).

users of the website, all as separate, unrelated incidents.

The importance of viewing all of the conduct as a part of a whole was discussed in one oft-relied upon decision. In ***Bart v. Telford***, 677 F.2d 622, 625 (7th Cir. 1982), the Seventh Circuit dealt with a series of small incidents, including being ridiculed for bringing a birthday cake to work for a co-worker. The court said that:

> "The effect on freedom of speech may be small, but since there is no justification for harassing people for excercising their constitutional rights it need not be great in order to be actionable . . . . [M]ore is alleged here -- an entire campaign of harassment which though trivial in detail may have been substantial in gross. It is a question of fact whether the campaign reached the threshold of actionability under section 1983."

677 F.2d at 625. The court remanded for trial.

Here the Tenth Circuit took the approach that a false arrest for publishing one detached incident. Then banning Smith from an entire campus was but another totally unrelated incident. Then the recent tactic of demanding the identities of all who wished to express their opinions on a topic, so they could be telephone and chastised for their thoughts, would be yet another incident entirely unrelated to everything else.

The Tenth Circuit simply never saw the relationship or totality of all the conduct. It said the pretextual arrest of Smith could be characterized as but "some evidence."

The Tenth Circuit never saw the totality of Plati's attacks on Smith's internet site, and did not allow a factfinder to consider the government's ongoing attacks as a whole.

The Tenth Circuit's conclusion suffers from one final error. All the cases, whether cited here or not, that Smith has found relate to instances of speech by individuals or small groups. None relate to the actions of a newspaper or radio station or other member of the media. Yet this Supreme Court has held that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium," the internet. ***Reno v. ACLU***, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344, 138 L. Ed. 2d 874, 897 (1997). Internet ***news*** such as Smith's netbuffs.com site is no less a news medium for the purpose of First Amendment scrutiny than does any more traditional form of news medium.[9]

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[9] Were the level of scrutiny different for an internet news site, it would be highly suspect. "[L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987), and so are always sbject to at least some degree of heightened First Amendment scrutiny." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640-641, 114 S. Ct. 2445, 2458, 129 L.Ed. 2d 497, 516-517 (1997).

This is an important reason why the Tenth Circuit's analysis misfits the facts of this case. All of the "chilling" cases cited by the Tenth Circuit, and others discussed here, arise from single incidents of speech by individuals or, rarely, by groups.

In no way could the New York Times or the Associated Press be forced to shut down their news dissemination completely in order to test the constitutionality of some limitation on what they said. Nor would a single writer from their staffs ever be silenced.

The First Amendment protects not only freedom of speech. It has two separate parts forbidding governmental interference with "abridging the freedom of speech, ***or*** of the press . . . ." (Emphasis added.). While often lumped together, the two rights are not necessarily coextensive.

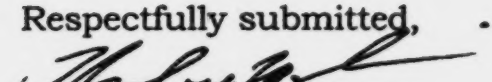
No, the modest internet site netbuffs.com could never be mistaken for some major newspaper, or network. Still, it does attempt to communicate ***news***. Forcing it to close down, and cut off even its twenty-seven thousand monthly viewers, is an entirely distinct act from silencing an individual.

The Tenth Circuit bypassed that distinction, and it is wrong for having done so.

CONCLUSION

For these reasons, Petitioner Smith respectfully requests that certiorari be granted and this case summarily be reversed and remanded for further proceedings.

Respectfully submitted,



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APPENDIX

THEODORE M. SMITH, Plaintiff-Appellant, v. DAVID PLATI, individually and in his official capacity as Assistant Athletic Director for Media Relations of the University of Colorado; THE UNIVERSITY OF COLORADO; and THE REGENTS OF THE UNIVERSITY OF COLORADO, Defendants-Appellees.

No. 99-1375

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

258 F.3d 1167; 2001 U.S. App. LEXIS 17040; 29 Media L. Rep. 2305; 2001 Colo. J. C.A.R. 3888

July 30, 2001, Filed

Appeal from the United States District Court for the District of Colorado. (D.C. No. 99-K-491). D.C. Judge John L. Kane Jr.

DISPOSITION:
District court's dismissal of Smith's claims AFFIRMED. Smith's allegation DISMISSED as moot.

COUNSEL:
David A. Lane, Miller, Lane, Kilmer & Griesen, Denver, Colorado (Theodore M.Smith, pro se, on the briefs) for Plaintiff-Appellant.

Patrick T. O'Rourke (Kevin J. Kuhn with him on the brief) of Montgomery, Little & McGrew, Englewood, Colorado, for Defendant-Appellee David Plati in his individual capacity.

David P. Temple, Assistant University Counsel (Joanne M. McDevitt, Associate Vice President/Senior Associate University Counsel; and Michael W. Schreiner, Senior Assistant University Counsel, with

him on the brief), Office of University Counsel, Denver, Colorado, for Defendants-Appellees the Regents of the University of Colorado and David Plati in his official capacity.

JUDGES:
Before EBEL, McKAY and LUCERO, Circuit Judges.
OPINION BY: EBEL, Circuit Judge.

Theodore Smith appeals the district court's dismissal of his claims against David Plati, the Assistant Athletic Director for Media Relations of the University of Colorado, the Regents of the University, and the University itself. In addition, Smith alleges that the district court erred when it ordered him to dismiss a parallel state court action raising virtually identical claims to those in his federal lawsuit. We AFFIRM the district court's dismissal, and, thus, hold that Smith's final allegation is moot.[1]

BACKGROUND

A. Smith's Allegations

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[1] Smith's claims against the University and Plati in his official capacity raise Eleventh Amendment issues. See Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 494 n. 3 (10th Cir. 1998). These must be resolved before a court may reach the merits. See Fent v. Okla. Water Res. Bd., 235 F.3d 553, 558 (10th Cir. 2000) (quotation marks and citation omitted). As discussed infra in footnote 3, Smith has abandoned his claims against the University. The Eleventh Amendment bars Smith's attempt at recovery of all forms of relief against Plati in his official capacity except for prospective equitable relief, which is permitted under Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), to remedy violations of the Constitution or federal law. See ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1188 (10th Cir. 1998). Since we hold, infra, that Smith has not alleged a violation of the Constitution or federal law, Ex parte Young does not provide Smith relief, and, moreover, we need not address Plati's claim of qualified immunity.

Theodore Smith launched and maintains a non-profit website named Netbuffs.com. It provides information, pictures, chat rooms, and message boards covering men's and women's athletic teams at the University of Colorado at Boulder. Smith is also a practicing Colorado attorney.

David Plati is the University's Assistant Athletic Director for Media Relations. The Athletic Media Relations Office is the liaison between the University's athletic department and members of the media.

Smith contends that "beginning in approximately the month of August, 1998," Plati decided "to censor Netbuffs.com and to do everything possible to interfere with it." Smith alleges that while "Plati's motives . . . are unclear, . . . it appears he has concluded Netbuffs.com is in some way in competition with the website still operated by the University's Office of Media Relations." For purposes of this appeal, the most important examples of this alleged interference are that Plati caused Smith to be detained and ticketed for allegedly trespassing in a University hallway; that Plati "denied to Claimant Smith resources of the Office of Athletic Media Relations routinely given to other media and to other fans of the University"; and that Plati "denied Plaintiff Smith and Netbuffs.com treatment as 'media' or 'press.'" Smith also alleges that Plati prevented Smith from talking to coaches, excluded him from football practices, required him formally to request and pay for materials given freely to the public, and kept him from distributing Netbuffs.com advertisements at a University athletic event.[2]

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[2] In general, when reviewing a motion to dismiss, a court examines only the allegations made in the complaint. See Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir.

B. Procedural History

Smith filed this action in Boulder County District Court in February 1999, asserting both state and federal (42 U.S.C. @ 1983) claims. He moved the state court for leave to depose Plati before entry of a case management order. The state court granted the motion and the order was to be entered March 12, 1999. Appellees, however, removed the case to federal district court on March 11, 1999, pursuant to 28 U.S.C. @ 1441. Plati also filed a motion for a stay of litigation to prevent discovery on any issues other than those relating to Plati's claim of qualified immunity. On April 20, 1999, the federal district court limited Smith's discovery accordingly. Two days later, on April 22, 1999, Smith commenced a "virtually identical state court action in the Boulder District Court (No. 99-CV-0677), omitting any federal claims so that the new action could not be removed."

Upon discovering the parallel state action, the federal district court ordered Smith to dismiss it. Smith complied, but contends on appeal that the district court's order was erroneous.

In March 1999, the University and Plati filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) (lack of subject matter

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1999). Unfortunately, in his Opening Brief, Smith overstates what allegations were properly before the district court on the motion to dismiss, both by including items in his Brief that he did not include in his complaint and by exaggerating allegations that were included in the complaint. For example, while in the Opening Brief Smith alleges that Plati falsely told a reporter Smith was guilty of larceny, resulting in an article harming Smith's reputation (see Opening Brief at 13), the complaint does not contain this allegation. In keeping with our obligations under Rule 12(b)(6), the recitation of Smith's allegations in the text of the opinion was drawn exclusively from the complaint.

jurisdiction) and 12(b)(6) (failure to state a claim). See Smith v. Plati, 56 F. Supp. 2d 1195, 1199 (D. Colo. 1999). Smith deposed Plati on the issue of qualified immunity on May 13, 1999. See id. The court heard oral argument regarding the motion to dismiss, and granted the motion. See id.

C. Issues on Appeal

As interpreted by the district court, Smith's second amended complaint makes five claims. First, Smith alleges that Plati and the University violated the Colorado Open Records Act, see Colo. Rev. Stat. @ 24-72-204, by not producing and permitting Smith to inspect various University documents. Smith failed to raise this issue on appeal and thus we deem it waived. See State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 984 n.7 (10th Cir. 1994) (stating that failure to raise an issue on appeal in the opening brief waives the issue).[3] Smith's second, third, and fourth claims allege that Plati violated 42 U.S.C. @ 1983 by causing Smith to be falsely arrested, retaliating against him for exercising his First Amendment rights, and denying him his First Amendment right to "gather news" from the University. Smith's fifth claim seeks an order of mandamus under Colorado Rule of Civil Procedure 106(a)(2)[4] requiring Plati and the University to treat him in the same way that they treat other members of the press. Smith alleges that the First Amendment guarantees him this right of equal access.[5]

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[3] At oral argument, Smith's counsel conceded that, on appeal, Smith had abandoned his claims against the University. Thus, we consider only the remaining claims against Plati in his official and individual capacities.

[4] The district court noted, and we agree, that "Smith does not specify the subsection [of Rule 106] under which he seeks relief, but the only one having a conceivable relevance is Rule 106(a)(2)." Smith, 56 F. Supp. 2d at 1203 (quoting the language of Rule 106(a)(2)).

[5] In his complaint, Smith styles Plati's actions as violating "the Constitutions of the United States of America and State of Colorado." (Complaint P 21.) To the district court and on appeal,

Finally, on appeal Smith asserts that the district court erred when it ordered him to dismiss the parallel state action.

JURISDICTION AND STANDARDS OF REVIEW

A. Jurisdiction

Smith filed this action in state court asserting one federal (42 U.S.C. § 1983) and two state claims. Appellees removed it to federal court pursuant to 28 U.S.C. § 1441. The district court had federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(a). We exercise jurisdiction pursuant to 28 U.S.C. § 1291.

B. Standard of Review

We review de novo a district court's dismissal under Rule 12(b)(1) and 12(b)(6). See U.S. West, Inc. v. Tristani, 182 F.3d 1202, 1206 (10th Cir. 1999) (Rule 12(b)(1)); Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (Rule 12(b)(6)). A motion to dismiss under Rule 12(b) "admits all well-pleaded facts in the complaint as distinguished from conclusory allegations." Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976). "We

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however, Smith rested this claim exclusively on the Speech and Press Clauses of the First Amendment to the federal Constitution. Therefore, we characterize it as such. See Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992) (observing that "[a] litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point") (quoting Pelfresne v. Vill. of Williams Bay, 917 F.2d 1017, 1023 (7th Cir. 1990)).

are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." United States v. Sandoval, 29 F.3d 537, 542 n.6 (10th Cir.1994).

Smith is a lawyer proceeding pro se. While we are generally obliged to construe pro se pleadings liberally, see Haines v. Kerner, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972), we decline to do so here because Smith is a licensed attorney, see Olivares v. Martin, 555 F.2d 1192, 1194 n.1 (5th Cir. 1977) ("Mr. Olivares proceeds pro se in his appeal. We cannot accord him the advantage of the liberal construction of his complaint normally given pro se litigants because he is a licensed attorney.") (citation omitted).[6]

DISCUSSION

A. False Arrest Claim

To state a claim under 42 U.S.C. § 1983 for false arrest, Smith must allege
two elements:

First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any

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[6] Even when a complaint is construed liberally, this court has dismissed pro se complaints for failure to allege sufficient facts. Hall v. Bellmon, 935 F.2d 1106, 1110, 1114 (10th Cir. 1991). Cf. Drake v. City of Fort Collins, 927 F.2d 1156, 1159 (10th Cir. 1991) ("Despite the liberal construction afforded to pro se pleadings, the court will not construct arguments or theories for the plaintiff in the absence of any discussion of those issues.").

State or Territory." This second element requires that the plaintiff show that the defendant acted "under color of law." Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). In circumstances similar to this case, this court has noted that the first element of § 1983 may require a greater showing to establish a substantive due process claim for false arrest than what would be required to allege a state law claim of false arrest:

The cases recognize that evaluations of rights and duties under § 1983 . . . arising as they do under the Fourteenth Amendment to the Constitution of the United States, are often different from counterpart common law actions which arise under state substantive law. This is not to say that at times the same set of facts will not give rise to remedies under both § 1983 and the state law of torts. The differences are . . . in terms of not only the requisite elements under § 1983, but also in the gravity of the right which has been invaded. For example, under state common law . . . the slightest interference with personal liberty is a false imprisonment. It does not follow that all such invasions however trivial or frivolous serve to activate remedies under the due process clause of the Fourteenth Amendment . . . . Wells v. Ward, 470 F.2d 1185, 1187 (10th Cir. 1972). In Wells, we refused to find a cause of action under § 1983 . . . where a student being ticketed for a traffic violation attempted to drive his car away and refused to sign a ticket. He was taken into custody, handcuffed, transported ten miles to a Justice of the Peace, not allowed to make bond on an American Automobile Association bond card, and kept in a cell for a period in excess of one hour. The [Wells] court stated that "in the final analysis this incident falls short, not only because the officers acted in accordance with local law requiring that a violator be arrested when he fails to sign the ticket, but also because the case is insubstantial."

Lessman v. McCormick, 591 F.2d 605, 610 (10th Cir. 1979) (citing Wells, 470 F.2d at 1189).

Similarly, in Lessman, plaintiff alleged that the mayor of Topeka, a bank, the police chief, and a police officer conspired to arrest her on a warrant alleging that she had failed to pay a parking ticket. See id. at 607. Plaintiff asserted that she was arrested, taken to the police station, and imprisoned until she paid the parking ticket. See id. Even after she paid the ticket, she stated that she was held until a bank employee appeared and told her the bank had prevailed upon the city to arrest and imprison her because she had failed to respond to the bank's letters regarding her indebtedness. See id.

The Lessman court noted, "No specific facts were alleged with respect to any defendants other than White [the police officer] and Reynolds [the bank employee], except that they 'arranged to have the defendant, White, arrest plaintiff,' and that they conspired to deprive plaintiff of her rights." Id. The district court dismissed the § 1983 claim for failure to state a cause of action. This court reversed, saying the issue was "close to the line of being an insubstantial deprivation of liberty, but without the development of facts we cannot say that it is, at least as to White and Reynolds." Id. at 611.

This case, in contrast, is not "close to the line." In his complaint, Smith mentions false arrest only twice, in paragraphs twelve ("Without legal or factual justification of any kind, Defendant Plati caused Plaintiff Smith to be arrested for 'trespassing' in a public place in the University's Office of Media Relations.") and seventeen ("Those damages specifically include . . . those attributable to his own work, incurred by Plaintiff Smith in response to the

arrest and order of exclusion caused by Plati."). These two references are not sufficient to sustain the requirements for an unconstitutional detention under § 1983. They are far sparser and more conclusory than those made in Lessman, where this court said the allegations were "close," yet ultimately sufficient to withstand dismissal. For example, Smith did not allege that he had been detained for a substantial period of time, handcuffed or otherwise restrained, physically assaulted by an officer, or confined in a jail or other room.[7] Even granting Smith's assertion, as we must on appeal from a motion to dismiss, that he was "arrested," we believe Smith has not alleged enough facts to state a § 1983 claim for deprivation of liberty in violation of the Fourteenth Amendment.[8]

Furthermore, and in contrast to Lessman, we have affirmed a district court's dismissal under 12(b)(6) for failure to state a § 1983 claim for retaliation against a plaintiff's freedom of speech in a case where the factual allegations were as sparse as Smith's. See Eames v. City of Logan, 762 F.2d 83, 86 (10th Cir. 1985). The district court in Eames advised the plaintiff that his First Amendment allegation was conclusory and required expansion to set forth a claim. See id. at 85. Plaintiff was given leave to amend his complaint, but he took no action, so the court dismissed the complaint without prejudice. See id.

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[7] At oral argument, Smith's counsel admitted that Smith had been only stopped and given citations by a University officer.

[8] Smith's declaration that he was issued a citation that banned him from the University's Boulder campus for one year does not support his § 1983 unlawful detention claim. We have found no cases, and Smith did not cite any to us, in which a court found that exclusion from an area supported a claim of unlawful detention.

While in this case, the district court did not specifically advise Smith that his false arrest claim was conclusory, we do not read Eames as imposing an advisement requirement, particularly where Smith has already filed two amended complaints. Rather, like Lessman, it stands for the proposition that plaintiffs must allege sufficient facts to support their @ 1983 claims. Bare conclusions, even read in the light most favorable to plaintiff, may prove insufficient. "The existence of the § 1983 remedy does not require that federal courts entertain all suits in which unconstitutional deprivations are asserted. A federal constitutional question must exist 'not in mere form, but in substance, and not in mere assertion, but in essence and effect.'" Wells, 470 F.2d at 1189 (quoting Cuyahoga River Power Co. v. N. Ohio Traction & Light Co., 252 U.S. 388, 397, 64 L. Ed. 626, 40 S. Ct. 404 (1920)).

The district court dismissed Smith's false arrest claim partially on the ground that the University officer made an independent evaluation before stopping and citing Smith. See Smith, 56 F. Supp. 2d at 1206. To determine that the officer's evaluation was indeed "independent," the court must have relied on the officer's written report, for nothing in Smith's complaint gives that impression. We decline to follow this approach because the police report constitutes evidence outside of the complaint, and on a motion to dismiss a court must restrict its inquiry to "the plaintiff's complaint alone." Sutton, 173 F.3d at 1236.

We nevertheless affirm the district court's dismissal of Smith's § 1983 "false arrest" claim on the ground that he failed to allege sufficient facts to support the pleading requirements for an unconstitutional detention. Cf. Sandoval, 29 F.3d at 542 n.6 ("We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit

conclusions of law, even grounds not relied upon by the district court.").

B. Retaliation

"Any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom." Worrell v. Henry , 219 F.3d 1197, 1212 (10th Cir. 2000). Recently, we adopted the following test to assess a claim of retaliation for exercising one's freedom of speech "against a defendant who is neither an employer nor a party to a contract with the plaintiff," as is the case here. See id. at 1213. Such a plaintiff must prove: (1) he was engaged in constitutionally protected activity; (2) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct. See id. at 1212. This approach has been followed by other circuits. See, e.g, Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999); Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998).

Smith's claim satisfies the first element, for publishing Netbuffs.com is undoubtedly an activity protected by the First Amendment. For purposes of this appeal we will assume without deciding that his claim satisfies the third element, as well. Nevertheless, it founders on the second element. Plati's actions did not cause Smith to suffer an injury that would chill a person of ordinary firmness from continuing to publish an internet site. Plati's actions may have made it more difficult to obtain some information regarding the

University's varsity athletic programs, but alternative avenues to information remained open. In addition, Plati did nothing to affect an ordinary person's ability to actually maintain a website. Plati neither prevented such private websites nor did he have the power to do so.[9]

The district court in this case recognized this when it wrote, "Smith continues to possess the ability to publish anything any citizen could by opening a privately operated website . . . . At all times, Smith retained, and still retains, the ability to speak freely about any political, social or other concern related to the University of Colorado athletic programs." Smith, 56 F. Supp. 2d at 1205. The focus, of course, is upon whether a person of ordinary firmness would be chilled, rather than whether the particular plaintiff is chilled. As the Ninth Circuit explained,

Because it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in

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[9] Smith makes much out of Plati's "attempts" and "threats" but alleges little concrete, retaliatory action. For instance, Smith alleges that Plati attempted to induce Smith's attorney not to represent him and attempted to interfere with Netbuffs.com by threatening to copyright athletic information. Smith, however, fails to allege enough context to show why these preliminary (and apparently unsuccessful) actions would chill a person of ordinary firmness. For example, perhaps Plati had a legal right to copyright the varsity sports schedules; Smith never alleges he did not. In the same vein, while Smith alleges that Plati had him excluded from football practices, he does not allege that he had a right to attend football practices. While it is true that when reviewing a motion to dismiss we must accept a plaintiff's allegations as true and view them in the light most favorable to the plaintiff, see Sutton, 173 F.3d at 1236, we need not - and, indeed, should not - manufacture allegations that are not there. As noted above, Smith is a practicing attorney and we decline to construe his pleading liberally.

his protected activity, we conclude that the proper inquiry asks "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities."

Mendocino Envtl. Ctr., 192 F.3d at 1300 (quoting Crawford-El v. Britton, 320 U.S. App. D.C. 150, 93 F.3d 813, 826 (D.C. Cir. 1996), vacated on other grounds, 520 U.S. 1273 (1997) (internal quotation marks and citation omitted in Mendocino)).

Nevertheless, Smith's persistence in maintaining his website offers some evidence that Plati's actions did not prevent such private speech.

In any event, we conclude the district court was correct to dismiss this claim and we affirm.

C. First Amendment Right of "Newsgathering"

Smith alleges that there is "some sort of right to newsgathering" protected by the First Amendment, which Plati and the University violated by declining to provide him certain information about its varsity athletic programs. See Opening Brief at 38. We disagree.

It is well-settled that there is no general First Amendment right of access to all sources of information within governmental control. See Houchins v. KQED, Inc., 438 U.S. 1, 9, 57 L. Ed. 2d 553, 98 S. Ct. 2588 (1978); see also id. at 15 ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."); Lanphere & Urbaniak v. Colorado, 21 F.3d 1508, 1511 (10th Cir. 1994) ("There is no constitutional right, and specifically no First Amendment right, of access to government records.").

This applies equally to both public and press, for the press, generally speaking, do not have a special right of access to government information not available to the public. See Houchins, 438 U.S. at 11; Pell v. Procunier, 417 U.S. 817, 834, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843, 850, 94 S. Ct. 2811, 41 L. Ed. 2d 514 (1974); Branzburg v. Hayes, 408 U.S. 665, 684-85, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972); Zemel v. Rusk, 381 U.S. 1, 17, 14 L. Ed. 2d 179, 85 S. Ct. 1271 (1965).[10]

Smith does not point to any Supreme Court or Tenth Circuit precedent establishing the right of access he seeks. Smith's citation to Branzburg is not to the contrary. In Branzburg, the Supreme Court remarked that "without some protection for seeking out the news, freedom of the press could be eviscerated," 408 U.S. at 681, and "news gathering is not without its First Amendment protections," id. at 707. These statements are prefatory dicta and do not create a right of access. In fact, in Houchins the Supreme Court expressly rejected Smith's suggestion: "[The Court's observation in] Branzburg v. Hayes . . . that 'news gathering is not without its First Amendment protections,' in no sense implied a constitutional right of access to news sources." 438 U.S. at 10 (citation omitted).

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[10] The Supreme Court has recognized that the First Amendment guarantees access to government records pertaining to criminal proceedings if (1) there has been a tradition of access to the information and (2) public access benefits the functioning of the particular process in question. See, e.g., Press-Enter. Co. v. Superior Court (Press Enterprise II), 478 U.S. 1, 8, 92 L. Ed. 2d 1, 106 S. Ct. 2735 (1986) (finding a conditional right of access to California pre-trial criminal proceedings). Cf. Journal Pub. Co. v. Mechem, 801 F.2d 1233, 1236-37 (10th Cir. 1986) (applying a similar analysis to coverage of certain aspects of a civil trial). Because Smith's claims do not involve a claim of denied coverage of a criminal trial in particular, or any trial proceeding in general, we do not find those cases particularly relevant.

Therefore, we conclude that Smith has not demonstrated that his alleged right of access to University athletic information exists, as a member of either the public or the press. Thus, the district court's dismissal of this claim was proper.

D. Claim for Mandamus for Violation of First Amendment Right of Equal Access

Smith seeks an order of mandamus under Colorado Rule of Civil Procedure 106(a)(2) requiring Plati to give Smith equal access to all information given to other members of the press. (See Complaint PP 19-22.) Smith grounds his claim for mandamus relief on the assertion that there is "some sort of protection against arbitrary and even malicious giving of access to some but denial to others."

In considering whether to issue a writ of mandamus, Colorado courts have generally applied a three-part test: (1) a plaintiff must have a clear right to the relief sought; (2) the defendant must have a clear duty to perform the act requested; and (3) there must be no other available remedy. See Sherman v. City of Colorado Springs Planning Comm'n, 763 P.2d 292, 295 (Colo. 1988). Mandamus will lie to compel a ministerial act, but it is an inappropriate remedy when the agency or officer has discretion. See Ahern v. Baker, 148 Colo. 408, 366 P.2d 366, 369 (Colo. 1961); Menchetti v. Wilson, 43 Colo. App. 19, 597 P.2d 1054, 1056 (Colo. Ct. App. 1979) ("C.R.C.P. 106 relief in the nature of mandamus will be granted only in cases where a clear legal duty exists for an administrative officer to perform a ministerial act."). "Mandamus will not lie to enforce duties generally, or to control and regulate a general course of official conduct for a long series of continuous acts to be

performed under varying conditions." Ahern, 366 P.2d at 369. For example, the Colorado Supreme Court has held that mandamus under Rule 106 is appropriate to compel an ousted government officer to turn over the books and papers of the office to the newly appointed office-holder. See Kepley v. People ex rel. Everson, 76 Colo. 233, 230 P. 804, 805-06 (Colo. 1924). In contrast, the Colorado high court explained that "mandamus will not ordinarily be granted to compel police officers to enforce the police or criminal laws generally, such as laws regulating intoxicating liquors." Ahern, 366 P.2d at 369 (citation and alterations omitted).

It is clear that under Colorado law mandamus does not lie to compel Plati to treat Smith like all other members of the media. Plati's job requires him to make on-going decisions regarding what University athletic information is made public, given to the press, or kept confidential - and every variety of decision in between - under constantly changing ircumstances. Smith asks this court to control and regulate the general course of Plati's official conduct as Assistant Athletic Director for Media Relations for a long series of continuous acts performed under varying conditions. Mandamus is not appropriate in this case because it would require a court constantly to be looking over Plati's shoulder and assessing whether, for instance, after consulting with the football coach and the athletic director, Plati's decision to permit five media photographers to set up their cameras on the sidelines during a home football game meant Plati had to grant sidelines access to Smith as well.

Therefore, while on a different ground than the district court, we affirm the dismissal of this claim. Cf. Sandoval, 29 F.3d at 542 n.6.

E. Anti-Injunction Act

Smith objects that the district court erred when it ordered him to dismiss the state court action which asserted virtually identical claims. Given that we affirm the dismissal of Smith's substantive claims, we hold that the issue is moot. An issue becomes moot when it becomes impossible for the court to grant "any effectual relief whatsoever" on that issue to a prevailing party. See Church of Scientology v. United States, 506 U.S. 9, 12, 121 L. Ed. 2d 313, 113 S. Ct. 447 (1992) (citing Mills v. Green, 159 U.S. 651, 653, 40 L. Ed. 293, 16 S. Ct. 132 (1895)).

Smith had an opportunity to fully and fairly litigate the state law claims in federal district court and to raise those issues on appeal. Those claims are now disposed of and any subsequent litigation would be barred by res judicata. See Cromwell v. County of Sac, 94 U.S. 351, 352-53, 24 L. Ed. 195 (1876) (holding that under res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in the prior action); see also Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466-67, 485, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982) (holding that once decided in a court of competent jurisdiction, the merits of a legal claim are not subject to redetermination in another forum); Stokke v. S. Pac., 169 F.2d 42, 43 (10th Cir. 1948) (same).[11]

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[11] Indeed, Smith concedes that this issue has now become moot: " Plaintiff Smith should have been allowed to continue with his state court action, and he should now be allowed to continue the action the court below told him he could bring in the state courts even when, if Smith prevails in any way on this appeal, the court below once again regains jurisdiction of this case upon remand." (Opening Brief at 63 (emphasis added).) Since we have affirmed the district court's dismissal on all claims, Smith has not "prevailed in any way on this appeal."

For the foregoing reasons, we AFFIRM the district court's dismissal of Smith's claims. We also as moot Smith's allegation that the district court erred when it ordered Smith to dismiss his parallel state court action.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THEODORE M. SMITH,

Plaintiff-Appellant,

v.

DAVID PLATI, individually and in his Official capacity as Assistant Athletic Director for Media Relations of the University of Colorado; UNIVERSITY OF COLORADO; REGENTS OF THE UNIVERSITY OF COLORADO,

Defendants-Appellees.

No. 99-1375

ORDER

Filed November 12, 2001

Before EBEL, McKAY and LUCERO, Circuit Judges

Theodore M. Smith's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. R. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: [s] K.r.
Deputy Clerk

Internet Sites (Credentials & Access)

University of Colorado Athletics has its own home page on the Internet **(www.CUBuffs.com)**. With the recent growth of the World Wide Web, the University of Colorado has adopted the following policies (as have some other Big 12 Conference member schools) regarding credentialialing and allow access to press and interviews. Nothing in this policy creates any right, entitlement or interest in media credentials to anyone or any entity, as this is a guideline only. The final decision for media credentials remains the sole and exclusive discretion of the director of athletic media relations (AMR).

* * *

3. Web-sites that sponsor "message boards," "message centers," or "chat rooms" where people are allowed to post anonymous information and rumors are automatically ineligible for any consideration for credentials or access. ***NOTE:***If a medium has an online site, and they sponsor these anonymous forums, they may continue to request credentials under its traditional medium (newspaper, magazine, radio, television) but will not be granted additional passes for online staff.

   Web-sites that request and wish to qualify for Credentials that sponsor these forums must display them in a manner where posters of information are both accurately identified (no monikers) and have accurate contact information.

THEODORE M. SMITH, Plaintiff, v. DAVID PLATI, individually and in his official capacity as Assistant Athletic Director for Media Relations of the University of Colorado; THE UNIVERSITY OF COLORADO; and THE REGENTS OF THE UNIVERSITY OF COLORADO, Defendants.

Civil Action No. 99-K-491

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

56 F. Supp. 2d 1195; 1999 U.S. Dist. LEXIS 11331

July 22, 1999, Decided

July 22, 1999, Filed

COUNSEL:
Theodore M. Smith, Esq., Plaintiff, Pro Se, Denver, CO.

For Defendants: Joanne M. McDevitt, Esq., Stephen Zweck-Bronner, Esq., David P. Temple, Esq., Office of University Counsel, Denver, CO.

For Defendants: Kevin Kuhn, Esq., Montgomery, Little & McGrew, Englewood, CO.

JUDGES:
JOHN L. KANE, JR., U.S. SENIOR DISTRICT COURT JUDGE.

OPINION BY:
JOHN L. KANE, JR.

OPINION:

MEMORANDUM OPINION AND ORDER ON PENDING MOTIONS TO DISMISS

KANE, J.

The Plaintiff, Theodore M. Smith, filed this case in the District Court, Boulder County, Colorado, on February 19, 1999. Defendants removed it to this court on March 11, 1999. Jurisdiction exists over the third claim for relief under 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 1983[1] (civil rights). Supplemental jurisdiction exists under 28 U.S.C. § 1367 over the pendent state claims, the first and second claims for relief.[2]

Smith is a lawyer appearing pro se. He operates an Internet website known as "Netbuffs.com," which supplies information about University of Colorado varsity athletic programs to the general public. The website began operating on September 2, 1997. Defendant David Plati (Plati) is Assistant Athletic Director for Media Relations at the University of Colorado at Boulder. The University of Colorado, a

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[1] Although the Second Amended Complaint does not mention any federal statute, in his motion for leave to proceed with limited discovery filed on April 28, 1999, Smith acknowledges his third claim for relief is under 42 U.S.C. § 1983. (Mot. Leave Proceed Limited Discovery at 3.)

[2] Jurisdiction to hear the first claim may exist under 28 U.S.C. § 1331 as well. The first claim describes Plati's actions as "arbitrary and capricious and contrary to the Constitutions of the United States of America and State of Colorado," yet characterizes this as a "state" cause of action. Accordingly, it asks for declaratory relief under Colo. R. Civ. P. Rule 106. However, before reaching Rule 106, the court must decide if there is a Constitutional violation which justifies declaratory relief. Thus, although the Colorado Rule may provide the remedy, it would only be available upon proof of a violation of the Constitution of the United States, a federal question.

state higher education entity, is governed by the Regents of the University of Colorado (together, the University).

Smith claims (1) Plati, in his individual and official capacities, arbitrarily and capriciously denied him and Netbuffs.com "media" status at the University of Colorado and seeks an order under Colorado Rules of Civil Procedure Rule 106[3] declaring that he be recognized as "media" and "press" by Plati and the University; (2) Plati, individually and officially, and the University denied him records that are subject to disclosure under the Colorado Open Records Act, Colo. Rev. Stat. § 24-72-201 et seq. (1998)[4] and seeks a mandatory injunction requiring the University to provide him with certain records and documents; and (3) Plati, individually and officially, deprived him

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[3] Colorado Rules of Civil Procedure, Rule 106 read in pertinent part:
"Relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure . . . . where the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person. The judgment shall include any damages sustained."

[4] Colorado Revised Statutes Section 24-72-201 (1998) states: "It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law." Section 24-72-202 defines "public records" as "all writings made, maintained, or kept by the state, any agency, institution, or political subdivision of the state . . . and held by any local government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." No exceptions specified under part 2 apply to this case.

of "rights and privileges and enjoyment in retaliation for Smith's publication on the Internet," (Second Am. Compl. P 29), and seeks compensatory and exemplary damages against Plati, as well as injunctive relief.

On March 11, 1999, the University filed a motion to dismiss the action pursuant to Fed.R.Civ.P. 12(b)(1) (for lack of subject matter jurisdiction) or 12(b)(6) (for failure to state a claim). On March 16, 1999, Plati, in his individual capacity, followed suit and filed a motion to dismiss under the same rules of federal procedure. In the interim, I granted Smith leave to depose Plati to elucidate the issue of qualified immunity. The deposition was taken on May 13, 1999. Following the deposition, Smith and Plati filed supplemental briefs. Smith did not, however, seek permission to file a further amended complaint. I heard oral argument on the motions to dismiss on June 23, 1999. For the reasons stated below, I grant the motions.

I. Factual Allegations.

The dispute between Smith and Plati centers on whether the Office of Athletic Media Relations for the University of Colorado must allow Smith access to information about its varsity sports programs so he can effectively operate his website.

According to Smith, from the time of the inception of his website until approximately August 1998, the University provided him with the same access and privileges afforded to members of the press. This allowed him ample opportunity to take photographs, interview players and coaches, and copy documents which he could then post on his Internet website. Starting in August 1998, however, Plati purportedly began a course of conduct designed to limit Smith's access to publishable information. Specifically, Smith

avers, Plati (1) denied him resources and documents routinely given to members of the press; (2) required payment for schedules, press releases, and photographs ordinarily given freely to other members of the public; (3) prevented the distribution of notices advertising Netbuffs.com; (4) threatened to copyright basic information such as varsity sports schedules; and (5) attempted to dissuade his attorney from defending him in a related criminal action. (Second Am. Compl. P 15.)

II. Applicable Standard for Motion to Dismiss.

Defendants assert this case must be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction because they are both immune from suit in civil action. The University claims (1) it is not a "person" for the purposes of 42 U.S.C. § 1983, and therefore does not fall under the statute's auspices, and (2) the Eleventh Amendment bars Smith from seeking either damages or injunctive relief. Plati argues he is entitled to qualified immunity because his actions were taken on behalf of the University in the course and scope of his duties as Assistant Athletic Director for Media Relations. Both the University and Plati contend their immunity defenses bar this court, or any other, from asserting subject matter jurisdiction over this case.

Alternatively, Defendants seek dismissal of the complaint for failure to state a claim under Rule 12(b)(6). Dismissal is appropriate under Rule 12(b)(6) "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff." Yoder v. Honeywell Inc., 104 F.3d 1215, 1224 (10th Cir.), cert. denied, U.S. , 118 S. Ct. 55, 139 L. Ed. 2d 19 (1997). The

University and Plati assert, since the Eleventh Amendment and the doctrine of qualified immunity respectively protect them from actions performed in an official capacity, no set of facts presented by Smith, in support of his three claims, entitles him to relief.

In considering a motion to dismiss, the task is necessarily limited. One should not consider whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. "It is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1973).

Additionally, as Smith is proceeding pro se, I must construe his complaint and other filings liberally. Haines v. Kerner, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972). "The Tenth Circuit has considered this to mean that if the court can reasonably read the pleading to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." Hall v. Griego, 896 F. Supp. 1043, 1046 (D. Colo. 1995) (quoting Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)).

III. Merits.

The Second Amended Complaint is not a model of clarity. It does not differentiate the claims alleged against Plati in his official capacity from those against him in his individual capacity. At oral argument,

Smith indicated he intended to sue Plati in his official capacity on all three claims. Although the motion to dismiss by Plati in his individual capacity addresses both the first and third complaints, at oral argument, counsel for Plati stated the only claim pled against Plati in his individual capacity was the third claim under 42 U.S.C. § 1983. Smith did not contest this assertion; however, applying a liberal pleading standard, I address both the first and third claims as against Plati individually. Accordingly, I address claims one and two as they apply to the University; claims one, two, and three as they apply to Plati in his official capacity; and claims one and three against Plati in his individual capacity.

A. University.

Smith names the University as a Defendant under his first and second claims for relief. I find the Eleventh Amendment entitles the University to absolute immunity on these claims.

The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This amendment embodies the principle of sovereign immunity and is a constitutional limitation on the federal judicial power established in Article III of the Constitution. It prohibits suits brought by citizens against their own states, as well as those brought by citizens of other states, without the consent of the state itself. Alden v. Maine, 144 L. Ed. 2d 636, 119 S. Ct. 2240, 1999 WL 412617, at 12 (U.S. 1999) (citing Hans v. Louisiana, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890)). Additionally, a suit against a state is barred regardless of whether it seeks damages or

injunctive relief. Cory v. White, 457 U.S. 85, 91, 72 L. Ed. 2d 694, 102 S. Ct. 2325 (1982).

Eleventh Amendment immunity may be waived. However, waiver is only recognized "where stated by the most express language or by such overwhelming implication from the test [of a state statute or constitution] as [will] leave no room for any other reasonable construction." Atascadero State Hosp. V. Scanlon, 473 U.S. 234, 239-40, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985).

Difficulties sometimes arise in determining whether a particular suit in fact is a suit against a state. It is clear, however, "that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984). This is generally described as the arm-of-the-state doctrine which "bestows sovereign immunity on entities created by state governments that operate as alter egos or instrumentalities of the states."
Mascheroni v. Board of Regents of the University of California, 28 F.3d 1554, 1559 (1994) (quoting Alex E. Rogers, Note, Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine, 92 Colum.L.Rev. 1243, 1243 (1992)). Under this doctrine, the Tenth Circuit has recognized the University of Colorado as a public entity entitled to Eleventh Amendment immunity. Rozek v. Topolnicki, 865 F.2d 1154, 1158 (1989).

Another often confusing aspect of Eleventh Amendment immunity is its applicability to state created law. The Supreme Court definitively resolved this ambiguity in Pennhurst by declaring:

> Neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. . . . We hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction.

Pennhurst, 465 U.S. at 121. Accordingly, a federal court must apply Eleventh Amendment immunity to claims based on state law as well as those based on federal law.

It is clear the University is entitled to Eleventh Amendment immunity from Smith's first and second claims for relief. First, as an "arm-of-the-state," the University may not be sued without the state's consent. No such consent was ever granted. Second, the Eleventh Amendment provides absolute immunity regardless of the nature of the relief sought. The fact that the first and second claims for relief seek equitable remedies as opposed to money damages makes no difference. Third, nothing in the record suggests the University "expressly" or "overwhelmingly implied" it intended to waive the sovereign immunity defense. Accordingly, Smith's assertion the University waived its Eleventh exercise jurisdiction over pendent state-law claims when considering the applicability of Eleventh Amendment immunity. Under the present circumstances, where the University is a direct party to the suit, all of these factors lead to one conclusion: the Eleventh Amendment bars Smith from proceeding under claims one and two for relief against the University. These claims are dismissed for lack of subject matter jurisdiction based on Eleventh Amendment immunity.

B. Plati In His Official Capacity.

Smith brings suit against Plati in his official capacity under all three claims for relief. These claims fail because Plati, in his official capacity, is entitled to Eleventh Amendment immunity.

As the Assistant Athletic Director for Media Relations at the University of Colorado at Boulder, Plati is a state officer and may be held personally liable for actions taken in his official capacities. Davoll v. Webb, 943 F. Supp. 1289, 1295 (D.Colo. 1996). However, the Supreme Court recognizes a suit against a government employee in his official capacity as tantamount to a suit against the government entity itself. As stated in Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 n. 55, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), "Official capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent." This sentiment was echoed in Kentucky v. Graham, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985), where the Court ruled, "As long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity." This concept was most recently applied by the Tenth Circuit in Ranson School district RE-82 v. Romer, 161 F.3d 619, 631 (10th Cir. 1998), in ruling, "When a suit is brought against state officials in their official capacities, the real party in interest in the case is the state, and the state may raise the defense of sovereign immunity under the Eleventh Amendment."

Instead of automatically dismissing these claims on Eleventh Amendment grounds, however, I must first consider an important exception to the sovereign immunity doctrine stemming from the Supreme

Court's ruling in Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). This exception suggests a state officer may be enjoined from "taking any steps towards the enforcement of an unconstitutional enactment, to the injury of complainant." Id. at 159. Modern interpretation of this rule suggests "that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity." ANR Pipeline Company v. D. Lafaver, 150 F.3d 1178, 1188 (10th Cir. 1998) (quoting Idaho v. Coeur d' Alene Tribe of Idaho, 521 U.S. 261, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997) (O'Connor, J., concurring)). Smith implies his claims fall within this exception and Plati, in his official capacity, can be sued for injunctive and monetary relief.

However, significant limitations exist on the Ex parte Young doctrine:

First, there must be an "ongoing violation of federal law." Johns v. Stewart, 57 F.3d 1544, 1552 (10th Cir. 1995). Second, "it applies only to prospective relief" and may not be used to obtain a declaration that a state officer has violated a plaintiff's federal rights in the past. Puerto Rico Aqueduct v. Metcalf & Eddy, Inc., 506 U.S. 139, 146, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993). Finally, it "has no application in suits against the States and their agencies, which are barred regardless of the relief sought." Id. Buchwald v. University of New Mexico School of Medicine, 159 F.3d 487, 495 (10th Cir. 1998). None of Smith's claims falls within these limitations. His first claim for relief asks for redress under Colorado Rules of Civil Procedure Rule 106. He clearly fails to identify an "ongoing violation of federal law," and therefore, does not fall under the Ex parte Young doctrine. Likewise, Smith's second claim seeks relief under the Colorado Open

Records Act, again failing to identify a violation of federal law, and not meeting the criteria for Ex parte Young. Finally, his third claim fails because the Eleventh Amendment bars its application against the University, regardless of relief sought.

Thus, as an "official capacity defendant, "claims brought against Plati are subject to the same Eleventh Amendment considerations as those brought against the University. The Ex parte Young doctrine, in certain situations, brings government officials out from under the umbrella of Eleventh Amendment immunity; however, Ex parte Young does not collapse the umbrella in this case. Plati, in his official capacity, is entitled to Eleventh Amendment protection and all claims brought against him in this capacity are dismissed.

C. Plati In His Individual Capacity.

Plati, in his individual capacity, is made a defendant under Smith's first and third claims for relief. Neither of these claims withstand scrutiny.

1. First Claim For Relief: Colo. Rules of Civ. Pro. Rule 106.

Under the first claim, Smith seeks injunctive relief pursuant to Colorado Rules of Civil Procedure Rule 106. This rule pertains to "Remedial Writs and Contempt" and is appropriate under exceptional circumstances (traditionally where a Writ of Habeas Corpus, Mandamus, Prohibition, etc., is deemed appropriate). Smith does not specify the subsection under which he seeks relief, but the only one having a conceivable relevance is Rule 106(a)(2):

Relief may be obtained in the district court by appropriate action under the practice prescribed in the

Colorado Rules of Civil Procedure . . . . where the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person. The judgment shall include any damages sustained.

Applying this rule to the first claim for relief, it seems Smith is arguing (1) Plati, in his individual capacity, is obligated to recognize Smith as "media" or "press" and afford him all benefits of such status; or (2) Smith has a legally enforceable right or entitlement to be recognized as "media" or "press."

On the first assertion, it is important to emphasize this discussion addresses this claim insofar as it is asserted against Plati in his individual capacity. There is no law or legal precedent which would place a duty on Plati to recognize Smith as "media" or "press" just because Smith operates an Internet Website. Even if Plati did concede Smith was qualified for treatment as "media" or "press," in his individual capacity, he would have no authority to provide him any benefits of such status. His ability to provide "media" and "press" entities with special access to information regarding University of Colorado athletic programs stems directly from his position as the Assistant Athletic Director of Media Relations. Thus, only in his official capacity could Plati provide Smith with the relief he desires. In this sense, Smith's Rule 106 claim against Plati, in his individual capacity, fails.

Secondly, as a general rule, the Constitution does not require government officials "to make available to journalists sources of information not available to members of the public generally." Pell v. Procunier, 417 U.S. 817, 834, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974). More fundamental, however, is the question of who is entitled to recognition as "press" in the first place. One commentator suggests the Supreme Court has denied members of the press special privileges under the First Amendment because "according the press special rights presents the insolvable problem of determining who qualifies as 'the press.'" The Supreme Court, 1977 Term, 92 Harv. L. Rev. 174, 179 (1978). Furthermore, "any meaningful definition of the press would involve the state in choosing among media representatives in a potentially unconstitutional manner." Id. This sentiment was expressed in Branzburg v. Hay , 408 U.S. 665, 704, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972), where the Court recognized, if special press rights were afforded, it would "be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." Accordingly, for Smith to claim he has a legally enforceable right to be recognized as "media" or "press," and afforded special treatment as such, is flatly incomprehensible.

For the forgoing reasons, I dismiss Smith's Rule 106 claim against Plati in his individual capacity.

2. Third Claim For Relief: 42 U.S. § 1983.

Smith's third claim for relief primarily seeks actual and exemplary damages against Plati in his individual capacity. Additionally, it seeks injunctive relief in the form of "granting Plaintiff Smith temporary restraining orders and preliminary and permanent injunctions against Defendant Plati and the University forbidding future interference with his rights of free speech to [sic] and to [sic] freedom of the press, and granting such other injunctive relief as is necessary." (Second Am. Compl. P 31(b).)

Insofar as the third claim seeks money damages against him in his individual capacity, Plati asserts a defense of qualified immunity against this claim. The qualified immunity doctrine derives from the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability. It is rationalized upon two justifications: "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligationss of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and judgment required by the public good." Scheuer, 416, U.S. at 236.

Recent Supreme Court and Tenth Circuit cases have codified a standard by which to implement this doctrine: "Government officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Wilson v. Layne, 526 U.S. 603, 143 L. Ed. 2d 818, 119 S. Ct. 1692, 1999 WL 320817, at *4 (U.S. 1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 808, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). See also Butler v. City of Prairie Village,

Kansas, 172 F.3d 736, 745 (10th Cir. Apr. 6, 1999), and Robinson v. City and County of Denver, 39 F. Supp. 2d 1257, 1999 WL 164041, at *6 (D.Colo. 1999).

This standard is guided by three significant considerations. First, "once a defendant claims qualified immunity, the plaintiff bears the burden of (1) coming forward with sufficient facts to show that the defendant's conduct violated the law; and (2) demonstrating that the relevant law was clearly established when the alleged violation occurred." Gehl Group v. Koby, 63 F.3d 1528, 1533 (10th Cir. 1997) (citing Pueblo Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988). Second, plaintiff must allege a specific law or right violated by defendant's conduct. "Bare allegations of malice should not suffice to subject government officials either to the costs of trial or the burdens of broad reaching discovery." Harlow, 457 U.S. at 817-818. Finally, plaintiff must show "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). The Tenth Circuit has interpreted this to mean there is "a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Robinson, 1999 WL 164041 at *6 (citing Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992)).

Once a defendant raises the qualified immunity defense, a court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." Wilson, 1999 WL

at 4. Smith claims Plati violated his rights of free speech and freedom of the press under the "First and Fourteenth Amendments of the Constitution of the United States of America and Sections 10 and 25 of Article II of the Constitution of the State of Colorado." (Second Am. Compl. P 16.) Further, he argues Plati performed a "constitutional wrong" by "causing a false arrest based on untrustworthy information." (Supp. Brief in Op. to Mot. to Dismiss at. p. 4.)

a. Free Speech and Freedom of Press.

Smith cites Patrick v. Miller, 953 F.2d 1240, 1247 (10th Cir. 1992) to support the proposition that speech related to "any matter of political, social or other concern to the community" is protected by the First Amendment. He also cites Pickering v. Board of Education, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968) to support his argument that a public employee may openly criticize policies of public agencies and facilities without being subjected to retribution. Curiously, Smith is not a public employee and his reliance on Pickering is perplexing at best. Under Patrick, Smith has a right to speak freely about "any matter of political, social or other concern to the community," including athletic programs at the University of Colorado. Likewise, under Pickering, he claims a right to criticize the University of Colorado without punishment.

Smith's argument runs into problems, however, in proving he was actually censored, or targeted for retribution, by Plati's actions. Censorship is "review of publications, movies, plays, and the like for the purpose of prohibiting the publication, distribution, or production of material deemed objectionable. . . ." Black's Law Dictionary 224 (6th ed. 1992). There are no allegations that Plati reviewed information Smith intended to post on his website with the purpose of

prohibiting its publication. Smith continues to possess the ability to publish anything any citizen could by opening a privately operated website. Smith cites several instances where Plati undertook a course of action which made it difficult for him to gain access to information ordinarily provided to the press. However, the First Amendment does not ensure anyone, even the press, access to special information or treatment: "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." Branzburg, 408 U.S. at 684. At all times, Smith retained, and still retains, the ability to speak freely about any political, social or other concern related to the University of Colorado athletic programs.

Likewise, retribution involves a relationship in which an employee is discharged or disciplined for expressing personal opinions which are contrary to those of the employer. Indeed, this is the situation which existed in Pickering where a high school teacher was discharged for publicly criticizing his school board's allocation of money throughout the district. The Pickering Court held it was a violation of the First Amendment to subject an employee to serious penalty or censure for publicly expressing personal opinions. Pickering, 391 U.S. at 564. The Pickering rule has no application to the present circumstances. Smith does not, nor did he at any time relevant to this controversy, work for the University of Colorado at Boulder; therefore, he was not disciplined for his actions as the plaintiff was in Pickering. Plati and the University were entitled to exclude private individuals from access to information or privileges designated specifically for the press or media. Branzburg, 408 U.S. at 684. In sum, Plati and the University are "doing business" when they provide access to information or special privileges to some and not to others. They are not required to "do business" with Smith. Thus Smith has not alleged the

deprivation of an actual First Amendment constitutional right based on censorship retribution.

b. False Arrest.

Smith argues Plati caused him to be arrested based on untrustworthy information. (Suppl. Br. In Opp'n to Def. Plati's Mot. to Dismiss p. 4.) Further, he maintains this action worked to deprive him of First Amendment rights to freedom of speech and press by denying his ability to publish information of public concern on Netbuffs.com.

In his original answer brief, Smith cited Baptiste v. J.C. Penney Co., 147 F.3d 1252 (10th Cir. 1998) and Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423 (10th Cir. 1984), to advance his false arrest claim. In Baptiste , a police officer was called to a retail store to apprehend a shoplifter. Upon arrival, the officer viewed a security video which clearly demonstrated the person accused of the crime was innocent. Yet, the police officer still arrested the person. In Lusby, police were again summoned to arrest a shoplifter. Upon arrival, the police asked the store security guard (an off duty policeman) what happened, then arrested the suspects without asking any witnesses for corroborating information. In both cases, information readily available to the police was disregarded and an arrest was made without probable cause. Hence, these cases demonstrate citizens have a right not to be arrested or detained under state authority without probable cause.

Plati correctly points out in his supplemental brief, probable cause is not the issue presented in this case. (Resp. Suppl. Br. Opp'n Plati's Mot. Dismiss at 9.) The issue is whether Plati denied Smith First Amendment rights by interfering with his ability to obtain and publish information on Netbuffs.com.

Neither Baptiste nor Lusby speak to First Amendment rights.

In Smith's Supplemental Brief in Opposition to Plati's Motion to Dismiss, he includes an argument under Clanton v. Cooper, 129 F.3d 1147 (10th Cir. 1997). In this case, a fire marshall knowingly and intentionally swore to untrue facts in an affidavit to obtain the plaintiff's arrest warrant. The Tenth Circuit held, "It has long been clearly established that the Fourth Amendment's warrant requirement is violated when 'a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit' if the false statement is necessary to a finding of probable cause." Id. at 1154 (citing Franks v. Delaware, 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978)). The gravamen is placing false information under oath before a judicial official. By invoking this case, in essence, Smith claims Plati knowingly and intentionally, or with reckless disregard for the truth, told Officer Arai, a University policeman, that Smith entered non-public areas of the Athletic Media Relations Fieldhouse, took literature to which he had no authorization, and posed a physical threat to his staff. On this basis, Smith argues Plati caused him to be falsely arrested, and wrongfully restricted from the University of Colorado campus, thereby violating a clearly established constitutional right. Plati, however, neither attempted to arrest Smith not to execute a false affidavit. Moreover, Officer Arai made his own determination based on matters in addition to Plati's complaints. At no time was Arai under the control of Plati nor was Plati performing a judicial or quasi-judicial act.

Plati's third claim is apparently one under the First Amendment for "Deprival of freedom of speech and of the press," (Second Am. Compl. P 9), and seeks money

damages in addition to "temporary restraining orders and preliminary and permanent injunctions forbidding future interference with his right of free speech to [sic] and to [sic] freedom of the press." (Second Am. Compl. P 31(a), (b).) In his supplemental response to Plati's motion to dismiss, however, Smith asserts Plati violated a clearly established Fourth Amendment right by "causing a false arrest based on untrustworthy information." (Suppl. Br. In Opp'n to Def. Plati's Mot. to Dismiss at p. 4.) A claim under the Fourth Amendment, however, is separate and distinct from one under the First Amendment for deprival of freedom of speech and the press. Apparently Smith seeks relief under the First Amendment for a claimed violation of the Fourth Amendment. Interchanging these constitutional claims makes it difficult, if not impossible, to conclude Plati has alleged the deprivation of a constitutional right at all, let alone that right was clearly established at the time of the alleged violation. For these reasons, I find Plati is immune from claims for money damages under the third claim for relief.

Qualified immunity does not protect a defendant in his individual capacity from a claim for injunctive relief. In addition to seeking money damages on the third claim, Smith seeks injunctive relief against "Defendant Plati" in the form of "granting Plaintiff Smith temporary restraining orders and preliminary and permanent injunctions against Defendant Plati and the University forbidding future interference with his rights of free speech to [sic] and to [sic] freedom of the press, and granting such other injunctive relief as is necessary." (Second Am. Compl. P 31(b).) I have already determined that Plati is entitled to Eleventh Amendment immunity on all claims insofar as he is sued in his official capacity. Theoretically, I could permit the third claim for

relief to go forward insofar as it seeks injunctive relief from Plati in his individual capacity. However, other than in his official capacity, Smith would not be in a position to carry into effect the injunctive relief sought and, in his official capacity, Plati cannot be precluded from continuing to exclude Smith from access to information or privileges designated specifically for the press or media. Accordingly, I grant the motion of Plati to dismiss the third cause of action insofar as it seeks both money damages and injunctive relief.

IV. Conclusion.

For the aforesaid reasons, I grant the motions to dismiss. Accordingly,

IT IS ORDERED THAT the University's Motion to Dismiss is GRANTED;

IT IS FURTHER ORDERED THAT Defendant David Plati's Motion to Dismiss and Motion for Stay of Litigation Pending Resolution of Qualified Immunity is GRANTED;

IT IS FURTHER ORDERED THAT this case is DISMISSED with each party to pay his or its own costs.

Dated this 22 day of July, 1999 at Denver, Colorado.

JOHN L. KANE, JR.

U.S. SENIOR DISTRICT COURT JUDGE